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VIRGINIA LAW REGISTER

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Our English brethren seem to be not without trouble in the working of their new Court of Criminal Appeal. It of course is a surprising thing to the American lawyer that this Court has no power to grant a new trial. The only thing it can do is to quash, reduce or increase a sentence. This latter is a power which we wish our Court of Appeals possessed. It would have the effect of staying a good many frivolous appeals. The following excerpt from the *London Law Journal* cannot fail to prove interesting, as indicating the views of one of the prominent English Justices upon this question.

The English Court of Criminal Appeal.

MR. JUSTICE BRAY, who is travelling the North-Eastern Circuit, has been giving some of his impressions of the working of the Court of Criminal Appeal. The number of appeals, he said, was growing and not diminishing. A good many convictions had been quashed and many sentences reduced, and he believed in only one case had a sentence been increased. How far had it proved beneficial? In two or three cases, perhaps more, persons who were, as far as could be judged, innocent had been convicted, and the convictions had been quashed on appeal. That was entirely for the good. If there was one thing more important than another, it was that an innocent man should never be convicted. Better that dozens, even hundreds, of guilty persons should be acquitted than that one innocent person should suffer. There had always been the power to appeal to the Home Secretary, who had power, through the prerogative of the King, to release a prisoner from sentence, but no power to quash a conviction, and the slur to that extent remained. Yet unfortunately a good many guilty persons had been released, as he supposed there always would be, either by errors in law or by want of care, and the only power of the Court of Appeal was to quash the conviction. The Court had no power to order a new trial. Still, he thought it was a moot point whether the Court should, as suggested, have the

power of ordering a new trial. If such power were given, it should certainly be exercised in very few cases indeed. The law in this country for many centuries had been that no man should be put on his trial twice, and he thought it dangerous to interfere with that principle.

Much interest was aroused amongst the profession and the general public by the case of the Commonwealth *v. McCue's Executors*, in which our Supreme Court held **Costs in Criminal Cases.** that the estate of McCue was responsible for the costs in the criminal trial in which he was convicted amounting to some three thousand dollars or more. That the estate of a criminal, if he had any, was liable for the costs of his trial has been settled in this state for a good many years, and was decided by our Supreme Court in *Anglea's Case*, 10 Gr. 705. It has been suggested that it is a very poor rule which does not work both ways and that if the estate of a convict could be made liable for the costs of his trial and conviction, ought not the state to be required to pay the costs of an accused person acquitted by the jury? Of course the flood-gates of argument could be opened to show that an immense amount of money would be taken from the state treasury by any enactment to this effect, but should the right and justice of any case be affected where the state is a party by any questions of mere monetary consideration? It is true that the criminal is entitled to have the power of the state exercised to summon to and keep his witnesses during his trial; but is not this a hardship upon witnesses and does it not very often retard the trial of a criminal case? As a general rule criminals have very little means—have hardly the ability to employ counsel, much less money to bring witnesses from a distance and keep them during the trial of a case and make them contented rather than reluctant witnesses. And in a case where the witness is a non-resident of the Commonwealth it is absolutely impossible for the prisoner to obtain attendance by any process of law emanating from the state. Ought not the state, if it recovers costs where a party is convicted, to be liable for costs where a party is acquitted? We are aware that the proposition is a novel one, but is there not some equity in it which should command our lawmakers' attention?

In that most excellent law magazine, the *London Law Journal*, we find the following editorial dealing with the duty of carriers to receive blind persons:

Railway companies, though common carriers of goods, are not common carriers of passengers, and there is nothing in the Railway and Canal Traffic Act of 1854 which prevents a company from making any sort of conditions in contracting to carry persons. As common carriers of goods they may not refuse to carry any kind of merchandise, and may be indicted for so doing (*Pozzi v. Shipton*, 1838); but while they must provide reasonable facilities for carrying passengers, it has never been decided in this country whether they are bound to receive and carry all persons who offer themselves to be carried. In America, indeed, it has been held that this duty is imposed upon them, but the better opinion is that neither the custom of the realm nor the common English law upholds such an obligation. The question becomes of importance in view of the action taken by the Great Eastern Railway Company in relation to blind persons using their line. The company propose to require every such passenger, upon taking a ticket, to sign a document by which he relieves them from all liability for any injury which he may sustain through his defective sight while travelling on the railway or using their premises, and also undertakes to provide for his assistance a guide at the stations where his journey begins and ends, and at any junction where he changes carriages. If the company are bound to carry him as any other passenger, there will be no consideration for this agreement, and it will be of no effect. But if there is no obligation of the kind, then the consideration specified—viz, that the company allow him to travel on their line—is good, and the contract will be legally binding, however harsh. The principle that a corporation cannot get rid of or diminish its liability for negligence by publicly announcing conditions under which it carries passengers has been affirmed recently in the case of *The Mayor of West Ham v. Clarke*; but, on the other hand, there is nothing to prevent a company excluding its liability by special contract (cf. *Hall v. The North-Eastern Railway*, 1874), provided, of course, there is good consideration. If, however, the legal rights of the company are doubtful, there can be no question about the harshness of its proposed innovation, which will practically compel the

blind to pay double fare. Railway companies have power by their by-laws to exclude from their trains drunken, diseased, and dirty persons, but this is in the interests of the travelling public. In the case of the blind, the only interest served by exclusion from the ordinary facilities is the selfish interest of the company itself. If the company should be proved in a test-case to have the right to refuse to carry a particular class of passengers, we hope that the Railway Commissioners will interfere to secure for the weak by law the right which should have been secured by humanity.

Of course the statement that in America the duty is imposed upon carriers of passengers to receive and carry all persons who offer themselves to be carried is entirely too broad, and does not correctly lay down the law in this country regarding the duty of carriers to receive feeble and infirm persons, unless it was intended that it should be confined solely to blind persons. While persons who are ill have a right to enter and travel upon the conveyances of a common carrier of passengers, nevertheless the carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental disability, is unable to take care of himself. The discussion of this question arose in the *Journal* upon a query as to the reasonableness of a rule requiring blind passengers to provide assistants. As to blind persons the statement, with some restrictions, is correct as to the American law. The rule is that each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend not on an universal, arbitrary and indiscriminating rule, but on the capacity to travel unaccompanied of the particular blind persons, as shown by the proof on that point in his case. Accordingly, a rule or regulation that no blind person whatever shall travel unaccompanied by an assistant, no matter how skilled or expert a traveler he may have been, or may be, and no matter how perfectly qualified in every other respect, to travel on cars unaccompanied, is an unreasonable rule and hence void. It is not every sick or crippled or infirm person whom a railroad regulation can exclude, but one who, though blind, is otherwise incompetent to travel alone on the cars. Otherwise the court would be compelled to hold that one suffering, no matter how slight, or one who had

lost an arm or leg, or one no matter how active physically, or no matter how expert a traveler, if blind, could be shut out by such a rule. So that, without considering the question whether carriers in England are bound to receive and carry suitable persons as is the case in this country, we believe that a rule or regulation of carriers of passengers excluding blind persons merely because of their blindness, is unreasonable and void.

The recent case of *Southerland v. Commonwealth*, in which our court of appeals decided that carrying a pistol incased in its scabbard in a pair of saddle bags, with the lids of the saddle bags pulled down, hiding the pistol from view, was not carrying a concealed weapon "about the person" within the meaning of the Virginia statute, though probably unimpeachable from a legal standpoint, is, in our opinion, decidedly contrary to public policy, and will most certainly tend to an increase of lawlessness. It is simply pointing out to the would-be assassin and to others "fatally bent on mischief," how they may ever be ready at a moment's notice to maim, disable or kill anybody against whom they may bear a grudge, or with whom they may have a difficulty, and yet be immune from punishment under this statute. It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of "toting" guns has always been one of the most fruitful sources of crime, and we believe the criminal statistics will bear us out in this statement. There would be a very decided falling off of killings "in the heat of passion" if a prohibitive tax were laid on the privilege of handling and disposing of revolvers and other small arms, or else that every person purchasing such deadly weapons should be required to register, as is the case when poisonous and other dangerous drugs are purchased at an apothecary shop. No doubt the words "about the person" in our statute necessitated this decision, because of the axiomatic rule in statutory construction that the criminal laws are to be construed strictly against the state, and no doubt any other ruling might

operate harshly upon a few law-abiding citizens, who may find it necessary to carry weapons for personal security, but as all laws must be framed with a view to furthering the best interests of the state, it would be better that those few should suffer this inconvenience, and probable exposure to danger, than that the lives of many people in this state should be uselessly forfeited every year at the hands of some irresponsible person who is allowed to carry about, even in his saddle bags, a gun ever ready for immediate use. In many of the states of the Union a person is forbidden, unless he be an officer of the law, to carry a weapon either concealed or not concealed, and we hope that our legislature may see fit to so amend this statute that the bad effects of this decision may be nullified. Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights. In that "lawless" state of Texas, "toting" guns is altogether forbidden, and we all know that the section of the Byrd law forbidding drinking on railroad trains is so far a dead letter, that it would hardly prevent this aforesaid son of Ham from consuming most of the quart even on the cars in this state.

Two interesting reports of special masters in the federal circuit court for the Eastern District of Virginia will be found on another page (see ante, p. 345). These reports reach opposite conclusions as to the effect of the filing of a creditors' bill or bill in the nature thereof upon the necessity for filing and recording the memorandum of a supply lien against the debtor within the time prescribed by § 2486 of the Virginia Code (1904). One holds that the filing of such a suit does not suspend or affect the time within which such a memorandum must be filed under this statute, viz, ninety days from the date when the last item of the supply account was due and payable, so that if not filed within the ninety days there is no lien. The other holds the reverse of this, viz, that the filing of such a bill does extend the time for the filing of the memorandum for record, so that if filed and the lien thus

Effect of Creditors' Suit on Time Limit for Maturing Supply Lien.

“matured” at any reasonable time pending the suit, the lien is good and binding although the ninety days had expired when so filed.

We are inclined to agree with the first holding, that of Special Master Holladay. The contrary holding is based principally upon the four previous cases in the circuit court cited therein, which, although they are to that effect, are shown above to be unsupported by the cases cited therefor and upon which alone they seem to be based. Special Master Hughes says that when a court of equity takes hold of a fund or piece of property it takes it as it is, and deprives no one of any right which he may have at that time. This is no doubt true, but the instances cited are those of liens already attached to the property, which it will of course administer and not suffer to be lost in consequence of any change of possession caused by such suit. This is an entirely different matter from interfering to give a lien which has not attached and which the statute allowing same expressly says *shall not exist unless* its provisions are complied with.

It is hardly correct to speak of such a lien as an “inchoate” lien, for there is absolutely no lien, only the possibility of one in a certain event which has not taken place. The filing of the memorandum is not the “maturing” of a lien but it is the taking of the first step to obtain one, which surely cannot be omitted or excused by the adventitious filing of such a suit as this. The wording of the statute is: “No person shall be entitled to the lien,” etc., unless he shall, within ninety days, etc., file the memorandum.

There is great force in what is said by Special Master Holladay, that the rule, as to suspending the statute of limitations by the filing of a creditor’s suit, is merely one of convenience to avoid a multiplicity of suits, and when the reason for the rule fails the rule also ceases to operate. There is no doubt of its application to existing debts and liens and suits for their enforcement, but this is a very different thing, as said above and in the opinion of Special Master Holladay, from extending the fixed time for acquiring an entirely new lien based wholly on the statute prescribing the conditions by which its benefits can be secured. And we find it stated in

27 Cyc. 125 that "under some statutes the filing of the prescribed statement is essential to the creation of the lien, even though enforcement thereof is sought solely against the owner and no rights of other persons are involved." It would seem that the Virginia statute is of this character. See, also, *id.*, 136, 150, where the general rule is stated that the failure to file, etc., within the time limited by statute, defeats the lien entirely. Such requirements are to be construed strictly, not liberally, as is stated by Judge Paul in one of the cases above referred to as supporting the view taken by Special Master Hughes in his report, and the claimant of such a lien is held to a strict compliance therewith.